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## THE REVISION OF THE NEW YORK LAW OF ESTATES

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When Governor Roosevelt recently signed the bill to amend the New York Law of Decedents' Estates, which the Legislature of 1929 had passed by a decisive vote, a new policy was established in that state, which has been said to be as significant in legal reform as was the English Property Act of 1925.<sup>1</sup> This legislation was the culmination of a suggestion made by Hon. James A. Foley in 1926.<sup>2</sup> It is an excellent example of scientific law-making. In 1927, the Legislature created a Commission of fifteen members to investigate and recommend as to the advisability of a revision of the law of estates and to prepare proposed legislation "for modernizing and simplifying the law of estates and the system of descent and distribution of property."<sup>3</sup> The Commission was composed of four surrogates and three members of the bar, who were appointed by Governor Smith, in addition to those members who were appointed by the presiding officers of the Senate and the Assembly from their respective houses. The surrogates were men whose experience in probate ranged from eight to twenty years.<sup>4</sup> Judge Foley was selected chairman of the Commission. After the defeat of the proposed act by the Legislature of 1928, the Commission was continued until 1929<sup>5</sup> when their recommendations were enacted into law. The wisdom and industry embodied in those recommendations are evidenced not only by their report but also by the methods which the Commission adopted in inviting criticisms of their proposals by the lawyers, courts, and bar associations of the State as well as soliciting suggestions from them.<sup>6</sup> Public hearings were held relating to the proposals, which were thereafter revised as discretion prompted.

Very properly, some of the provisions of the Act may be said to be revolutionary.<sup>7</sup> Certain provisions of the statutes governing the law of property, which have prevailed for a century or more, have been changed.<sup>8</sup> Section 189 of the Act abolishes the estate of curtesy; section 190 abolishes the right of dower. To say that the abolition

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<sup>1</sup>Slater, *Reforms in the New York Law of Property* (an address before the 1929 meeting of the New York State Bar Association) 7.

<sup>2</sup>Foley, *The Revision of the Law of Estates* (1928) 51 N. Y. BAR ASSN. REP. 137.

<sup>3</sup>N. Y. Laws 1927, c. 519.

<sup>4</sup>Foley, *op. cit. supra* note 2.

<sup>5</sup>N. Y. Laws 1928, c. 175. <sup>6</sup>Slater, *op. cit. supra* note 1, at 8, 21. <sup>7</sup>*Ibid.* 5.

<sup>8</sup>*Report of Commission to Investigate Defects in the Laws of Estates* (1928) 8.

of the dower right is revolutionary is correct only if regarded from an abstract point of view. The right has become "an illusion and deception." One of the most notable revelations by the Commission was that a search of the records of the Supreme Court of New York County indicated that not a single action for the admeasurement of dower was brought either in the year of 1925 or the year of 1927.<sup>9</sup> In the five years from 1923 to 1927, only nine such actions were brought. In Kings County, which has the greatest number of owners of real property of any county in the State, the average number of actions per year for the same period was five. The law had failed to function. The law in practice and the law in books were different. The title to realty, even the home,<sup>10</sup> was taken in the name of a corporation for the purpose of preventing dower from attaching. When the Uniform Partnership Act was adopted, the establishment of the rule of "out and out conversion" of realty precluded dower.<sup>11</sup>

Blackstone complained that "the claim of the wife to her dower diffusing itself so extensively, it became a great clog to alienation, and was otherwise inconvenient to families."<sup>12</sup> England abolished the inchoate right of dower as a restraint on alienation in 1833. In Vermont, the inchoate right of dower was abolished in 1787. The only right of the wife was in the real property of which her husband died seised. The status of the dower right in the various states<sup>13</sup> at the present time indicates that New York has now brought its law in harmony with progress. To divest a wife of her dower right makes land a liquid asset. That was the purpose of the adoption of the theory of conversion with reference to partnership realty. It facilitates its alienability; it simplifies the examination of title.

Why the dower right is but a shadow of its former substantial self is readily understood by comparing the dower in an agricultural period, when realty was the chief form of capital, with dower in an industrial and commercial period, when land values represent but a small portion of the wealth of a nation. This is particularly true when the individual's interest in realty may be in the form of the stocks or bonds of a corporation which has title to it. Convincing evidence of this is the fact that an examination of the records of the Surrogate Court of New York County showed that 96% of all persons dying without a will left only personal property.<sup>14</sup>

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<sup>9</sup>*Ibid.* 10.

<sup>10</sup>*Ibid.* 9.

<sup>11</sup>Sections 25 (2e), 26 of the Uniform Act; N. Y. Cons. Laws c. 39 (Partnership Law) §§ 51(2e), 52.

<sup>12</sup>2 BL. COMM. \*136.

<sup>13</sup>*Supra* note 8, Appendix 1, p. 61.

<sup>14</sup>*Supra* note 8, at 8.

Although curtesy and dower are abolished, the Act is socially significant because of the increased protection which it gives to the husband and wife in lieu of their prior rights. Their new rights are reciprocal. Where a testator dies leaving a will, the surviving spouse is entitled to elect an intestate share subject to certain limitations, conditions, and exceptions. These provisions are too specific to enumerate.

The Act abolishes the distinction between real and personal property which previously existed in the law of descent and distribution. However important the distinction may have been in the feudal system or in determining questions of jurisdiction of the common law and the ecclesiastical courts, it is no longer an important one. Indeed, New York was one of the seven states that retained separate tables for descent of real property and the distribution of personalty.<sup>15</sup> Today thirty-one states have a uniform table for descent and distribution. The other ten have a uniform table with slight modifications which relate to the surviving spouse. It seems too obvious for discussion that the rights of persons taking at death in case of intestacy ought not to depend upon the accidental form of the property which passes.

The object of the Act has been to protect those individuals who stand in immediate relation to the deceased. This is shown in the amendment which is made relating to devises and bequests to charity, which were valid to the extent of one-half of the estate if the person left surviving a husband, wife, child, descendant, or parent. Under section 17, as amended, the validity of such a provision can be contested only by one who falls within the classes mentioned as favored.

The exemptions for the benefit of the family have been increased by section 200. Due to the changed conditions of living, the value of the exemptions has been more than doubled. In keeping with modern development, a motor vehicle or tractor appears among the favored listed articles of exemption.

Many other changes are made in the law by the recent New York Act which will become effective on September 1, 1930.<sup>16</sup> Inasmuch as it sweeps away many familiar notions, Judge Slater has admonished<sup>17</sup> lawyers to read the new law and be prepared to redraw unjust wills, "since it contains no provision for saving prior wills."<sup>18</sup>

The Commission commented on the absurdity of section 17 of the Decedents' Estate Law which prohibited a testator from leaving

<sup>15</sup>*Supra* note 8, at 70.

<sup>16</sup>Section 21.

<sup>17</sup>Slater, *op. cit. supra* note 1, at 18.

<sup>18</sup>*Supra* note 16.

more than one-half of his estate to charity. Although it was designed to protect the surviving spouse, parent, or descendant, it did not do so, because it did not prohibit the testator from leaving the other half to a stranger and entirely ignoring his dependents.<sup>19</sup> The new Act adequately protects the surviving spouse, but it does nothing to protect the other dependents of the deceased. This is a serious defect. Whenever the wife without separate property predeceases her husband, and whenever he licitly or illicitly becomes attached to another woman, there is no assurance that, if he dies during their minority, they will not be pauperized by his deliberate act. Whenever a step-mother has influence over her spouse and minor children survive, or whenever the second matrimonial venture proves a failure and adult children of the first marriage contend with minor children of the second, the dependency of the minor children becomes highly probable.<sup>20</sup> Examples of such neglect have been common. Judge Foley has said:

"The unlimited power conferred upon the maker of a will by our New York law of liberty of bequest is absolutely at variance with the legal liability of an unnatural father. . . . Under our humanitarian laws he may be compelled during his life by criminal proceedings or civil process to contribute to the support of a wife or minor children. Death frees his property from this liability and he may do with it what he pleases by a valid will. The average testator is just in his testamentary gifts to his dependents, but examples of injustice often occur. In my experience as Surrogate I have seen several. In one case a man left his entire estate to his mistress disinheriting his dependent wife and his two infant children. The Domestic Relations Court in New York City had ordered him to pay weekly allowance for their support. The will was drawn by an attorney and there was slight ground for contest."<sup>21</sup>

Clearly, the new Act provides a remedy for only a part of the defects of the old law. There is no reason why the law should tolerate the pauperization of minor dependents. However, the Commission seems to have considered the matter. Judge Slater has expressed the hope<sup>22</sup> that "this subject may be studied by a Commission and the law humanized so at least minor children may be permitted to share in a parent's estate." It is apparent that no testator ought to be permitted to saddle upon charity his dependent children in the exercise of his testatorial right.

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<sup>19</sup>*Supra* note 8, at 12.

<sup>20</sup>Laube, *Right of Testator to Pauperize His Helpless Dependents* (1928) 13 CORNELL LAW QUARTERLY 559, 584.

<sup>21</sup>Foley, *op. cit. supra* note 2, at 150.

<sup>22</sup>Slater, *op. cit. supra* note 1, at 24.

That the problem is a vital one, in England as well as in New York, is seen from the activity of Viscount Astor in the House of Lords. Within the last two years he has introduced two bills<sup>23</sup> designed to prevent the scandalous conduct of any testator who is inclined to shift the financial responsibility of caring for helpless dependents to the State. Under the "Memorandum" of the bill of 1929, one discovers "The principal effect of the Bill will be that testators will not make capricious and unreasonable wills, knowing that such a course inevitably leads . . . in the last resort to rectification by the court." Proceedings in court are authorized where the child or descendant (a) is under the age of sixteen years; or (b) is attending a full time educational establishment; or (c) is unable, by reason of mental or physical unfitness, to support himself.<sup>24</sup> In any proceeding under the Act, the court is given the power to declare that the whole or any part of the estate of the testator shall go and devolve as if the testator had died intestate where it is needed for Family Maintenance.<sup>25</sup> The opposition to Viscount Astor's proposal is well observed from the debate in the House of Lords on May 16, 1928, which was precipitated by a resolution to appoint a select committee to investigate the laws relating to testamentary disposition so far as family maintenance is concerned. Although there seemed a disposition to recognize that there were "very hard cases" under the existing law, the proposal did not meet with favor.<sup>26</sup> New York should adopt such a proposal.

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<sup>23</sup>One was introduced in 1928, the other in March, 1929.

<sup>24</sup>Section 4 (5).

<sup>25</sup>Section 10.

<sup>26</sup>71 PARLIAMENTARY DEBATES, LORDS 46.